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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>CASEY RAY TARBUTTON,<br>Defendant and Appellant. | E049186<br>(Super.Ct.No. FSB900405)<br>OPINION |

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Reversed.

J. Peter Axelrod, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, and Tami Falkenstein Hennick, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Casey Ray Tarbutton appeals after he was convicted in a jury trial of petty theft with a prior and commercial burglary. It was the third trial on these charges. Defendant contends that the trial court erred in the first trial in declaring a

mistrial over his objection, and that the Double Jeopardy Clauses of the United States and California Constitutions prevented his retrial. The Attorney General concedes the issue, and agrees that defendant's convictions must be reversed.

## FACTS AND PROCEDURAL HISTORY

On the afternoon of January 27, 2009, defendant took a shirt, a belt, a package of bandanas and a flashlight from a Sears store at a mall. Loss prevention officers observed defendant's progress through various departments of the store. Although defendant could have stopped at a number of registers to pay for the merchandise, he left the store without doing so. He was halted a short distance outside the store and brought back to the loss prevention office. Defendant had carried a shirt over his arm; the tags had been discarded inside the elevator. Defendant had fastened the belt around his waist under the shirt he was wearing. He had taken the bandanas from their package and placed them in his pocket. Defendant also had a black flashlight in his pocket as well as a knife which could cut open the plastic packaging. A cut plastic package was found near the elevators.

Defendant was charged with one count of commercial burglary and one count of petty theft, with a prior theft offense. The amended information also alleged that defendant had two prior serious felony convictions (strikes), and three prior prison terms.

Defendant went on trial for the first time in April 2009. The jury had been sworn and two witnesses had testified, when the bailiff informed the court that a person outside the courtroom had been overheard, in the presence of some of the jurors, saying something to the effect that, if one or more jurors did not agree, defendant "would not have to do 25 to life." The person, identified as Jhanette Bradford, was brought into the

courtroom, outside the presence of the jurors, and questioned about the incident. Bradford denied speaking to any of the jurors. She said she had been sitting on a bench outside the courtroom, talking on her phone to someone at her home. She did not know who anyone in the area was, and did not know that some may have been jurors. The court stated, "I have indication that a juror heard you. You weren't as quiet as you thought." The court directed that Bradford be excluded from the courtroom, and in fact ordered her not to be in the courthouse during the duration of the trial. Neither defense counsel nor the prosecutor requested a mistrial at that time.

The trial then proceeded with the testimony of another witness, Daniel Clark, a police officer. The People rested and the court called a recess. The prosecutor informed the court that Officer Clark's wife apparently had overheard one of the jurors, outside the courtroom, remarking that "this is so wrong. This person is going to go to jail for 25 years to life, and this is wrong, and all he did was take a few things. He only had one foot out the door. I'm only one person, but I'm going to make a difference." Officer Clark's wife identified the person as one of the jurors, and described the juror's appearance. Officer Clark's wife was unsure, however, whether the juror was speaking to another juror, or perhaps was talking on a mobile phone.

The court proposed to poll the jurors to determine whether any of the jurors had been approached or heard someone say something to them about the case. Defense counsel stated, "I don't think I want a mistrial." The prosecutor replied, "I do." Upon the court's inquiry, at least three of the jurors recounted that, although they had not been "approached," per se, someone speaking on a mobile phone could be heard stating that, if

defendant were convicted, he could be sentenced to 25 years to life. Because there were only two alternates empanelled, the court stopped inquiring after learning that three jurors had overheard Bradford's remarks about the potential sentence in the case. The court stated its belief that it "ha[d] no choice. The whole reason for the bifurcation was to ensure that the penalty in this case as well as the prior for the petty theft not go before the jury until the appropriate time. [¶] Clearly, this is not the appropriate time, and for the record, the Court finds that Ms. Bradford did this purposefully and with the intent that the jury be tainted. . . . She's clearly obstructing justice here. The record will reflect she caused this mistrial, which the Court will now grant . . . ." The court then discharged the jury.

A second trial commenced on June 1, 2009. Immediately after opening statements, and before the first witness was called, defense counsel requested a mistrial, because the prosecutor had inadvertently mentioned the offense of "petty theft with a prior" during her summation of the expected evidence. In addition, the prosecutor apparently also showed a computer slide presentation to the jury during opening statements, which included a document that the court had excluded. The court ruled that, although the prosecutor's mistake was inadvertent, the defense motion for mistrial should be granted.

Defendant was tried a third time, beginning in July 2009. This time, the case proceeded to verdict, and the jury convicted defendant of both charged offenses. In a bifurcated portion of the trial, the jury found true the predicate prior theft offenses to establish petty theft with a prior. It also found true the strike priors, and two of the three

prior prison term allegations. The court sentenced defendant to an indeterminate term of 25 years to life for the commercial burglary, plus consecutive one-year terms for each of the two prison priors. The court imposed identical terms on the offense of petty theft with a prior, but stayed sentence under Penal Code section 654.

Defendant filed a timely notice of appeal.

## ANALYSIS

Defendant raises several contentions on appeal. His first argument is that his convictions should be reversed because the trial court erroneously ordered a mistrial in the first trial, over defense objection and without manifest necessity, in violation of the federal and state constitutional guaranties against double jeopardy. Because the Attorney General concedes this initial dispositive argument, we do not address defendant's additional issues on appeal.

Defendant points out that, although the trial court had inquired of three jurors whether they had overheard Bradford saying something to indicate that defendant's potential exposure on the case was 25 years to life, the court never asked any further questions to determine whether the jurors were willing or able to disregard the remarks, or whether the juror(s) could continue to hear the evidence and conduct deliberations without being affected by what they had heard. The court did ask the prosecutor's opinion; she indicated that the court could "do it on its own motion at this point." The court heard nothing further from defense counsel, but proceeded immediately to grant a mistrial.

At the second and third trials, no mention was made of the double jeopardy issue. However, as defendant argues, "Defendant's failure to object does not . . . preclude his arguing on appeal that he was deprived of his constitutional right not to be placed twice in jeopardy." (*People v. Saunders* (1993) 5 Cal.4th 580, 592.)

Here, jeopardy had attached in the first trial when the jury was empanelled and the first witness was sworn and testified. Thereafter, a discharge of the jury without a verdict barred retrial, unless the defendant consented, or unless legal necessity required it. (*Crist v. Bretz* (1978) 437 U.S. 28, 35 [57 L. Ed. 2d 24, 98 S. Ct. 2156]; *People v. Compton* (1971) 6 Cal.3d 55, 59.)

Defendant contends that there was no manifest necessity for declaring a mistrial, under either federal or state constitutional jurisprudence, in the absence of any inquiry whether the jurors who had been exposed to Bradford's comments could disregard them, and still render an impartial verdict in the case. "Given the state of the record with the trial court's failure to determine the willingness and ability . . . of the jurors to fulfill their obligations in spite of the overheard comments," defendant argues, the conclusion is inescapable that "the mistrial was declared for the very purpose that the double jeopardy provisions of our state and federal Constitutions were designed to prevent: '. . . a prosecutor or judge . . . subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict.' [Citation.]"

The Attorney General concedes the issue, and requests that the court reverse the convictions as prayed by defendant. We agree. Accordingly, we reverse the judgment.

## DISPOSITION

Defendant was placed once in jeopardy, and the jury was discharged without rendering a verdict. Defendant did not consent to the jury's discharge, nor was there a manifest necessity to declare a mistrial. The judgment is therefore reversed with directions to the trial court to dismiss the charges.

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/s/ McKINSTER
Acting P. J.

We concur:

/s/ KING
J.

/s/ MILLER
J.